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INTRODUCTORY NOTE TO YONG VUI KONG V. PUBLIC PROSECUTOR (SING. CT. APP.)

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Introduction

On March 4, 2015, Singapore's Court of Appeal issued its judgment in *Yong Vui Kong v. Public Prosecutor*, upholding the punishment of caning imposed on the defendant as constitutional. The decision is significant because it discusses the impact of the prohibition of torture, a peremptory norm of international law, on domestic legislation. The Court of Appeal determined that, even if caning were to be considered a form of torture, the customary international law prohibition on torture did not invalidate its domestic law permitting caning as a form of punishment.

Background

Yong Vui Kong is a Malaysian national, born in 1988. In 2007, he was charged with trafficking 47.27g of heroin, an offence under Singapore's Misuse of Drugs Act, which attracted a mandatory death sentence. In 2008, he was found guilty of the offence of drug trafficking and sentenced to the death penalty.

In 2010, Yong Vui Kong challenged his death sentence, contending that the mandatory death penalty was a form of inhuman punishment, which violated his right to life under Article 9(1) of the Constitution of Singapore.[1] The Court of Appeal rejected this challenge, finding that Singapore's Constitution did not include an implied prohibition of inhuman punishment,[2] and that, even if customary international law prohibiting inhuman punishment had been incorporated into Singapore legislation, the mandatory death penalty did not constitute inhuman punishment.[3]

In 2011, the Singapore government undertook a review of the mandatory death penalty and, as a result of this review, amended various pieces of legislation. Under the Misuse of Drugs (Amendment) Act 2012, which entered into force in 2013, a person convicted of a drug trafficking offence punishable with death could instead be sentenced to a mandatory sentence of life imprisonment and fifteen strokes of the cane, depending on their role and level of co-operation with the Narcotics Bureau. In November 2013, the High Court of Singapore found that Yong Vui Kong met the requirements set out in the amended Misuse of Drugs Act and commuted his death sentence, sentencing him instead to life imprisonment and fifteen strokes of the cane.

Singapore is one of only a small number of countries in the world that retains the punishment of caning on its statute books. Under its Criminal Procedure Code, male offenders under the age of fifty can be sentenced to up to twenty-four strokes of a rattan cane, not exceeding 1.27 centimeters in diameter.

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The Court of Appeal's Decision

Yong Vui Kong challenged his sentence of caning on three grounds. First, it was argued that the practice of caning amounted to torture. Second, it was submitted that imposing the punishment of caning on a prisoner already sentenced to life imprisonment did not serve any deterrent function, and was irrational and illogical. Third, it was argued that the application of the punishment was discriminatory in nature, as it did not apply to men over the age of fifty or to women, and that it therefore contravened the Constitution's non-discrimination clause.

There is no explicit prohibition of torture under the Constitution of Singapore. The appellant's first claim, that caning constituted torture, therefore centred on Article 9(1) of the Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty save in accordance with law." The appellant argued that caning constituted a deprivation of personal liberty that could not be "in accordance with law," given that it contravened a peremptory (or *jus cogens*) norm of international law, the prohibition of torture.

Singapore is not a party to the Convention against Torture, but it is widely recognised that the prohibition against torture is both customary international law and a *jus cogens* norm of international law. The Court of Appeal, while accepting the international legal status of the prohibition against torture, found that, as a dualist state, Singapore's international legal obligations did not apply unless transposed into law through domestic legislation or "declared to be part of the domestic law by the courts."[4] The Court drew no distinction between *jus cogens* and other international legal norms in this regard, and found that even peremptory norms of international law could not take precedence over domestic legislation where there was inconsistency between the two.[5] Even if caning did amount to torture, the Court reasoned, the fact remained that it was expressly mandated by statute law, and the international legal prohibition of torture would only take precedence over such statute law if it had been both incorporated into domestic law and given constitutional status.[6]

The fact that Singapore was party to the Convention on the Rights of Persons with Disabilities, which expressly prohibits torture, was deemed similarly irrelevant, as the treaty had not, at the time of the judgment, been incorporated into domestic law. The Court declined to enter into an exercise of "interpretive incorporation" of the state's international legal obligations through its interpretation of domestic law, finding that treaty obligations cannot "trump an inconsistent domestic law that is clear and unambiguous in its terms."[7]

The Court did, however, accept that there was a common law prohibition against torture that had been transposed into domestic law.[8] However, it adopted a rather narrow definition of torture, finding that the prohibition relates to the torture of suspects during interrogations for the purposes of extracting information or confessions and thus did not cover corporal punishment.[9]

Notwithstanding that the Court found that caning would still be legal in light of the above findings on the status of the torture prohibition under domestic law, it proceeded to consider whether caning could be considered a form of torture.[10] It noted the

distinction between torture and inhuman treatment, and reiterated its earlier decision that the latter was not prohibited under Singapore's law.[11]

The Court recalled that, in *Tyrer*, the European Court of Human Rights found that the practice of "birching" (whipping the clothed buttocks of boys with a birch rod) constituted degrading punishment, but not torture.[12] The Court distinguished one case, where the Inter-American Court of Human Rights found that flogging with a "cat-o-nine tails" (a whip made up of nine knotted lashes) constituted torture, from the case before it.[13] It deemed caning to be less severe than this form of flogging, as it is administered on the buttocks, in private, and with a medical expert present.[14] Similarly, an African Commission on Human and Peoples' Rights decision, where public lashing on the victims' bare backs using a wire and plastic whip was found to violate the prohibition on torture and cruel, inhuman, or degrading punishment, [15] was distinguished from caning in the present case.[16] In light of the above, the appellant's contention that the practice of caning constituted torture (and thus was not "in accordance with the law" under Article 9(1) of the Constitution) was unsuccessful.

Article 9(1) of the Constitution was also relied upon as the basis for the appellant's argument that imposing an additional sentence of caning on those already serving a life imprisonment sentence was so irrational and arbitrary that it could not constitute "law."[17] Evidence was brought to show that the practice had no deterrent effect in practice and that it could cause resentment and bad behaviour amongst prisoners who had been subjected to caning. The Court found that sentencing policy was a matter for the legislature, not the courts.[18]

Similarly, the appellant's argument that the imposition of the sentence of caning only on males under fifty was discriminatory was dismissed, because it was found that Parliament had its policy reasons for excluding women and older men.[19] As these reasons were not manifestly irrational, the Court could not interfere with them.[20] Lastly, the appellant's reference to the colonial and racist roots of the practice of caning was deemed to be irrelevant, as the punishment had been adopted by Singapore's own Parliament since independence.[21]

Conclusion

The Court's finding that torture could be permitted if expressly provided for in a domestic statute is troubling and may open the door to other states similarly deciding that the *jus cogens* prohibition of torture does not prohibit them from torturing individuals in their own territory. This restrictive reading of the prohibition seems to go against recent international developments, particularly in international courts. In *Furundžija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) found that the fact that torture is prohibited by a *jus cogens* norm of international law had an effect on what states could do within their own territories.[22] The ICTY noted that it would be "senseless" to argue that the *jus cogens* nature of the prohibition renders treaties between States void *ab initio*, while at the same time finding that national law could authorise or condone torture.[23] Yet, this is exactly what the Singapore Court of Appeal found in this case. This decision stands in contrast to a growing body of practice,[24] which appears to show that peremptory norms of international law can and do have a bearing on states' legislative, administrative, and judicial functions.

The definition of torture in the decision is also overly restrictive and not in line with international or domestic practice. The Court referred to the 2005 House of Lords decision in the case of *A and others v. Secretary of State for the Home Department (No. 2)* in justifying its narrow definition of torture as being linked to the purpose of obtaining information or a confession. However, that decision pertains precisely to the use of evidence obtained through means of torture, and thus it is logical that it would focus on the link between the acts of torture and the evidence in question. Moreover, it does not limit the definition of torture in the way the Court of Appeal suggests it does; rather, it explicitly reiterates the full Convention against Torture definition (which includes the purpose of "punishing him for an act he has committed or is suspected of having committed") in full.[25] Indeed, Lord Justice Hoffman notes that he "would be content for the common law to accept the definition of torture which Parliament adopted in section 134 of the Criminal Justice Act 1988, namely, the infliction of severe pain or suffering on someone by a public official in the performance or purported performance of his official duties."[26] The Court's narrow definition of the "common law" prohibition of torture is not, therefore, supported by its own source.

As Singapore (like other ASEAN states) is not, at present, a party to a regional human rights mechanism with an independent human rights Court or Commission, it is not open to Yong Vui Kong to take his case to such a body. An attempt to seek a prohibiting order from the High Court, preventing the caning from going ahead, was struck out in July 2015 and a costs order was imposed against Yong's lawyer.[27] Unless Singapore amends its domestic legislation, it seems very likely that the punishment of caning will go ahead.

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[1] Yong Vui Kong v. Public Prosecutor (2010) SGCA 20 (Sing.).
[2] *Id.* ¶ 72.
[3] *Id.* ¶ 120. For further analysis, see Yvonne McDermott, Yong Vui Kong v. Public Prosecutor *and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?*, 1 INT'L J. H.R. AND DRUG POLICY 35 (2010); Aravind Ganesh, *Insulating the Constitution:* Yong Vui Kong v. Public Prosecutor *[2010] SGCA 20* 10 OXFORD UNIV. COMMONWEALTH LAW J. 273 (2010).
[4] Yong Vui Kong v. Public Prosecutor [2015] SGCA 11, ¶ 29 (Sing.).
[5] *Id.* ¶ 35–36.
[6] *Id.* ¶ 38.
[7] *Id.* ¶ 50.
[8] *Id.* ¶ 58.
[9] *Id.* ¶ 59 (citing A and others v. Secretary of State for the Home Department (No. 2) [2005] UKHL 71).
[10] *Id.* ¶ 76.
[11] *Id.* ¶ 83 (citing Yong Vui Kong v. Public Prosecutor (2010) SGCA 20, ¶ 72 (Sing.)).
[12] *Id.* ¶ 86 (citing Tyrer v. The United Kingdom [1978] ECHR 2).
[13] *Id.* ¶ 87–90 (citing Caesar v. Trinidad and Tobago, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 123, (Mar. 11, 2005)).
[14] *Id.* ¶ 99.
[15] Curtis Francis Doebbler v. Sudan, Communication 236/00, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (May 4, 2003).
[16] *Id.* ¶ 99.
[17] *Id.* ¶ 100.

[18] *Id.* ¶ 101.
[19] *Id.* ¶ 108-110, 114–116.
[20] *Id.* ¶ 111.
[21] *Id.* ¶ 119.
[22] Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 155 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).
[23] *Id.*
[24] See the examples cited in Erika de Wet, *The Prohibition of Torture as an International Norm of* jus cogens *and Its Implications for National and Customary Law*, 15 EUR. J. INT'L LAW 97 (2004).
[25] A and others v. Secretary of State for the Home Department (No. 2), [2005] UKHL 71, ¶ 32.
[26] *Id.* ¶ 97.
[27] Yong Vui Kong v. Attorney-General [2015] SGHC 178 (Sing.) *available at* http://www.supremecourt.gov.sg/docs/default-source/module-document/judgement/yong-vui-kong-v-attorney-general.pdf.